

FILED

AUG 08 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NC-07-1093-KSP
CANDIE JILL NELSON,) Bk. No. 05-10660
Debtor.)
_____)
CANDIE JILL NELSON,)
Appellant,)
v.) MEMORANDUM*
MICHAEL H. MEYER, Chapter 13)
Trustee,)
Appellee.)
_____)

Argued and Submitted on July 27, 2007
at Pasadena, California

Filed - August 8, 2007

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: KLEIN, SMITH and PERRIS,** Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

**Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the
District of Oregon, sitting by designation.

Filed
RECEIVED

AUG 15 2007
U.S. BANKRUPTCY COURT
SANTA ROSA, CA

1 This appeal is from a dismissal of a chapter 13 case
2 following a remand in a prior appeal. Nelson v. Meyer, 343 B.R.
3 671 (9th Cir. BAP 2006) (Nelson I). We previously reversed and
4 remanded for procedural reasons based on the two-step requirement
5 of 11 U.S.C. § 1307(c) to determine "cause" and then weigh the
6 alternatives of conversion or dismissal based on the "best
7 interests of creditors and the estate."

8 On remand, the court again declined to confirm the plan and
9 because it determined that the debtor was not eligible for relief
10 in chapter 13 because her debts exceeded the eligibility
11 requirements of 11 U.S.C. § 109(e) and because her chapter 13
12 plan was not proposed in good faith. The denial of confirmation
13 was not timely appealed. The subsequent order dismissing the
14 case is now before us.

15 We now agree with the bankruptcy court that there was
16 § 1307(c) "cause" and dismissal of the case was in the best
17 interests of creditors and the estate. We AFFIRM.

18
19 FACTS

20 Appellant, Candie J. Nelson, filed the pro se chapter 13
21 case in which this appeal arises on March 29, 2005, after having
22 been involved in five prior bankruptcy cases.

23 She was a chapter 13 debtor from December 30, 1999, until
24 voluntarily dismissing that case on September 24, 2001.

25 In October 2002, she became the debtor in two chapter 7
26 cases, one involuntary and one voluntary. We affirmed the order
27 for relief in the involuntary case. BAP No. NC-03-1170-PMaMc
28 (Feb. 9, 2004). The ultimate outcome was a settlement in which

1 \$60,000 was recovered from the debtor's mother under avoiding
2 powers and the debtor waived discharge pursuant to 11 U.S.C.
3 § 727(a)(10).

4 The debtor's company, Viva Mexico, LLC, was the debtor in a
5 no-asset chapter 7 case that was filed and closed during the
6 pendency of her consolidated individual chapter 7 cases.

7 In the present chapter 13 case, the debtor initially
8 scheduled unsecured claims of \$324,382.00. Her chapter 13 plan
9 proposed to pay the trustee \$50.00 per month for 36 months based
10 on monthly income of \$1,208.00 and expenses of \$1,158.00 as
11 reflected in Schedules I and J.

12 The chapter 13 trustee, appellee Michael Meyer, objected to
13 plan confirmation based on ineligibility and lack of good faith.
14 The ineligibility argument was that the schedules listed more
15 than the statutory limit of \$307,675.00 in unsecured nonpriority
16 debt and did not include undischarged debts from her prior
17 chapter 7 cases. The good faith argument was that \$50.00 per
18 month for 36 months was too little in light of the prior waiver
19 of chapter 7 discharge.

20 At the confirmation hearing, the court denied confirmation
21 without reaching the eligibility question. In addition, without
22 affording an opportunity to modify the plan after denying
23 confirmation, the court ruled that the case would be dismissed.
24 On appeal, the debtor complained that she was prepared to modify
25 the plan but had no chance to do so.

26 We reversed and remanded the dismissal order because the
27 court did not comply with the two-step requirement of 11 U.S.C.
28 § 1307(c) to determine "cause" and then weigh the alternatives of

1 conversion or dismissal based on the "best interests of creditors
2 and the estate," and also because the court did not allow the
3 debtor at least one opportunity to revise the rejected plan as
4 required by § 1307(c)(5). Nelson I, 343 B.R. at 678.

5 On remand, the debtor re-submitted her originally filed plan
6 with the court without change. The court held a confirmation
7 hearing on July 17, 2006. At the conclusion of the hearing, the
8 court took the matter under submission.

9 On July 26, 2006, the court entered its "Memorandum on Plan
10 Confirmation." The court determined that the debtor's debts
11 exceeded the limit for chapter 13 eligibility as set forth in
12 § 109(e), and further determined that the debtor proposed her
13 plan in bad faith. Based on those findings, the court denied
14 confirmation of the debtor's plan and indicated that it was
15 necessary to bring the multiple bankruptcy filings to an end.

16 On August 23, 2006, the trustee filed a motion to dismiss
17 the debtor's case pursuant to § 1307 due to debtor ineligibility
18 and denial of confirmation of her plan. At a hearing held on
19 September 18, 2006, the court granted the trustee's motion.
20 However, based on the debtor's statement that she planned to
21 appeal the order denying confirmation of her plan, the court
22 stayed its dismissal order until an appeal from the order denying
23 confirmation became final. If the debtor's appeal was
24 unsuccessful, the court would enter its order dismissing the
25 case.¹

26
27 ¹The debtor filed a notice of appeal on September 27, 2006.
28 The appeal was dismissed as untimely.

1 We dismissed the debtor's appeal of the order denying
2 confirmation of her plan on January 19, 2007, for lack of
3 jurisdiction because there was not a timely appeal. Nelson v.
4 Meyer, BAP No. NC-06-1342 (1/19/07). The debtor did not appeal
5 our order.

6 In the meanwhile, notwithstanding the findings of bad faith
7 and ineligibility, on October 19, 2006, the debtor filed an
8 amended chapter 13 plan, upon which the court declined to act,
9 which is implicit in its subsequent entry of the previously
10 announced dismissal order.²

11 The bankruptcy court entered its order dismissing the
12 debtor's case on February 28, 2007.

13 This appeal ensued.

14 15 JURISDICTION

16 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
17 We have jurisdiction under 28 U.S.C. § 158(a)(1).

18 19 ISSUE

20 Whether the bankruptcy court abused its discretion when it
21 dismissed the debtor's chapter 13 case.

22 23 STANDARD OF REVIEW

24 Orders of dismissal are reviewed for an abuse of discretion.
25 Guastella v. Hampton (In re Guastella), 341 B.R. 908, 915 (9th

26
27 ²The debtor's amended plan extended plan payments from 36
28 months to 60 months, and provided for reporting of any change in
the debtor's financial status and amendment to payments if a
change were to occur.

1 Cir. BAP 2006). An abuse of discretion may be based on an
2 incorrect legal standard, or a clearly erroneous view of the
3 facts, or a ruling that leaves the reviewing court with a
4 definite and firm conviction that there has been a clear error of
5 judgment. SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001);
6 Ho v. Dowell (In re Ho), 274 B.R. 867, 871 (9th Cir. BAP 2002).

8 DISCUSSION

9 In Nelson I, we reversed and remanded the bankruptcy court's
10 order dismissing the debtor's case pursuant to § 1307(c)(5)
11 because the court did not comply with the statute's two-step
12 requirement to determine "cause" and then weigh the alternatives
13 of conversion or dismissal based on the "best interests of
14 creditors and the estate," and also because the court did not
15 allow the debtor an opportunity to revise the rejected plan.
16 Nelson I, 343 B.R. at 677-78.

17 On remand, the debtor resubmitted her originally filed plan
18 without any changes. At the confirmation hearing, the bankruptcy
19 court examined whether the debtor proposed her resubmitted plan
20 in good faith under the totality of the circumstances.

21 Looking at the totality of the circumstances, the court
22 determined that the debtor filed her case "in a cynical attempt
23 to manipulate the Bankruptcy Code." The court further found
24 that:

25 [t]here is no doubt in the court's mind that when [the
26 debtor] stipulated to denial of her discharge in the
27 Chapter 7 case[,] she had already formed the intent to
28 buy her discharge back on the cheap in a Chapter 13.
[The debtor's] intentions are to obtain a discharge
without ever having to answer for her unlawful conduct.
The legal effect of confirmation would be to discharge,

1 with no justice or compensation to her creditors, a
2 debtor who a few months prior to filing was denied a
discharge. This is not the spirit of Chapter 13.

3 Memorandum on Plan Confirmation, 4:9 - 4:14, 7/26/06 (footnote
4 omitted).

5 The court concluded that the debtor proposed her plan in bad
6 faith and further was not eligible for chapter 13 relief. Based
7 on these findings, the court denied confirmation of the debtor's
8 resubmitted plan. That denial of confirmation was not timely
9 appealed.

10 The court subsequently dismissed the debtor's case pursuant
11 to § 1307(c)(5) based on the denial of confirmation of her plan
12 and for "cause". The present appeal is from that dismissal.

13 A court must examine the totality of the circumstances in
14 determining whether a chapter 13 petition has been filed in bad
15 faith. Ho, 274 B.R. at 876. When making a bad faith
16 determination, the bankruptcy court should consider:

17 (1) Whether the debtor misrepresented facts in his or
18 her petition or plan, unfairly manipulated the
Bankruptcy Code or otherwise filed the Chapter 13
petition or plan in an inequitable manner;

19 (2) the debtor's history of filings and dismissals;

20 (3) whether the debtor's only purpose in filing for
21 chapter 13 protection is to defeat state court
litigation; and

22 (4) whether egregious behavior is present.
23

24 Id., citing Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224
25 (9th Cir. 1999).

26 The California Rural Assistance League ("CRAL") filed a \$1.3
27 million claim in the debtor's chapter 7 case. The CRAL filed the
28 claim on behalf of at least fifty former employees of Viva Mexico

1 who allege that the debtor is personally liable to them for
2 unpaid wages in violation of California law. A state court
3 action has been pending against the debtor since 1999 - Aguilar,
4 et al v. Nelson, SCV-222860. While we do not have the complaint
5 from that action, we are told in declarations that the action is
6 against the debtor personally for unfair business practices under
7 California Business and Professions Code § 17203, for
8 intentionally maintaining two sets of employee time records (one
9 of which was fraudulent) in violation of California Labor Code
10 §§ 226 and 1174, and for systematically causing her LLC to
11 underpay employees.³

12 Multiple and successive bankruptcy filings by and against
13 the debtor have stayed progression of the state court case.

14 In the debtor's chapter 13 case, filed in March 2005, she
15 only listed four former employees with wage claims on her
16 schedules. The four former employees are the four named
17 plaintiffs in the state court litigation. The debtor listed the
18 value of each of the four former employees' claims at \$1,000
19 each.

20
21 ³Declaration of Robert Lotero, 7/17/06 at pg. 2 (exhibit R
22 to E.R.); Declaration of Kelly Lentz [entitled Declaration of
23 Robert Lotero], 7/17/06 at pg. 2 (exhibit T to E.R.) ("While
24 working as a 'manager' I was told by [the debtor] that she keeps
25 two separate records of employee time. She told me that she
26 keeps the accurate timesheets or timecards that show the real
27 hours worked by each worker. She further told me that she
28 fabricates a second time record for each worker and removes most
of the overtime worked. She told me that she does this to save
on money that she would otherwise have to pay workers. ... On
various occasions during my employment I observed [the debtor]
manipulating the time clocks in the restaurants. At various
times she told me and other 'managers' in my presence, that she
could control the time clocks to show less hours than the
employee actually worked.")

1 The bankruptcy court found, and there is evidence in the
2 record on appeal, that the debtor has refused to provide her
3 former employees with employment records and other pertinent
4 documents, thus making it nearly impossible for her former
5 employees to calculate the exact value of their wage claims.

6 The record amply supports the bankruptcy court's finding
7 that the debtor filed her chapter 13 petition in bad faith. The
8 debtor is a serial bankruptcy filer and has been so since 1999
9 when several of her former employees commenced state court
10 litigation against her for violation of state labor laws.
11 Moreover, the debtor filed the present chapter 13 petition
12 shortly after stipulating to the denial of her discharge in her
13 previous chapter 7 case.

14 The bankruptcy court found that the debtor misrepresented
15 facts in her schedules and filed the present case to manipulate
16 the Bankruptcy Code. The court also commented on the debtor's
17 egregious behavior by stating that "[a] bad faith finding is
18 necessary to finally resolve [the debtor's] bankruptcy rights,
19 especially for the fifty or so working people who were
20 intentionally robbed of their rightful income by [the debtor]."

21 In light of the totality of the circumstances, the
22 bankruptcy court correctly dismissed the debtor's case pursuant
23 to § 1307(c) as in the best interests of creditors and the
24 estate.⁴

27 ⁴Because we are affirming the court's order dismissing the
28 debtor's case under § 1307(c), we need not address whether the
debtor is ineligible for chapter 13 relief under § 109(e).

CONCLUSION

The bankruptcy court did not abuse its discretion when it dismissed the debtor's chapter 13 case under § 1307(c)(5).

AFFIRMED.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. NC-07-1093-KSP

RE: CANDIE JILL NELSON

A separate Judgment was entered in this case on ____8/8/07____.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$455 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy
Appellate Panel of the Ninth Circuit, hereby certifies that a copy
of the document on which this certificate appears was mailed this date
to all parties of record to this appeal.

By: Elaine Lewis

Deputy Clerk: August 8, 2007

A handwritten signature in cursive script, appearing to read "Elaine Lewis", with a long horizontal flourish extending to the right.